

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA COMMISSIONER OF HEALTH

In the Matter of the Application for
License by Covenant Home Care

**RECOMMENDATION ON MOTION FOR
SUMMARY DISPOSITION**

By written motion filed with the Office of Administrative Hearings (OAH) on April 29, 1997, the Department of Health has moved for summary disposition in the above-entitled matter. Mr. Gerald Buchanan, on behalf of Covenant Home, submitted a timely response to the Department but did not file a response to the motion with OAH until May 19, 1997. The Department filed a reply on May 13, 1997. No appearances were made. The record closed on May 19, 1997.

Susan Casey, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota, 55103-2106 represented the Minnesota Department of Health.

Gerald Buchanan, President, Covenant Home Care, 4886 West Lake Road, Duluth, Minnesota 55811, represented himself and Covenant Home.

Based upon the Memoranda filed by the parties, all of the filings in this case, and for reasons set out in the Memorandum which follows:

IT IS HEREBY RECOMMENDED:

1. That the Department's motion for summary disposition be GRANTED.
2. That Gerald Buchanan be collaterally estopped from relitigating the issue of his responsibility for Health Personnel's noncompliance with the home care statute and rules.
3. That the decision by the Minnesota Department of Health to deny Mr. Buchanan's application for a home health care license pursuant to Minn. Rules, pt. 4668.0012, subp. 11.E be affirmed.

Dated this ____ day of June, 1997.

ALLEN E. GILES
Administrative Law Judge

MEMORANDUM

This is an appeal by Gerald Buchanan challenging a decision by the Minnesota Department of Health ("Department") to deny Mr. Buchanan's application for a home health care license in the name of Covenant Home Care. The Department notified Mr. Buchanan of its decision to deny his license application in a letter dated April 17, 1995. The Department based its denial on its conclusion that Mr. Buchanan was the person substantially responsible for the failure of another home care agency to comply with the home care statute and rules. The other home care agency, which was founded and formerly owned by Mr. Buchanan, did business as Health Personnel/Silver Lining Assisted Lifestyle (hereinafter referred to as "Health Personnel" or "Licensee").

Pursuant to Minn. Rules, pt. 4668.0012, subp. 11.E, a license shall be denied if the commissioner determines that an owner or "managerial official" of another licensee was "substantially responsible for the other licensee's failure to substantially comply with Minnesota Statutes sections 144A.43 to 144A.49, and this chapter." The home care rules define a "managerial official" as a person other than the owner of a home care agency who has the authority to establish or control business policy. Minn. Rules, pt. 4668.0003, subp. 20. Mr. Buchanan filed a timely appeal of the Department's decision and the matter was deferred pending the outcome of the contested case hearing involving the nonrenewal of Health Personnel's license.

On July 28, 1995, following the close of the record, Administrative Law Judge Susan M. Williams issued Findings of Fact, Conclusions and Recommendation in In the Matter of an Assessment and Denial of Renewal of License Issued to Health Personnel/Silver Lining Assisted Lifestyle. (OAH Docket No. 73-0900-8852-2). In her Report, Judge Williams recommended that the Commissioner assess penalties and deny the renewal of Health Personnel's license. On June 27, 1996, the Commissioner of Health heard oral arguments from both parties regarding exceptions to the ALJ's Report. On September 3, 1996, the Commissioner issued her final order in the matter. The order adopted the ALJ's Report. In addition, the Commissioner made a specific finding that "Gerald Buchanan is the actual individual responsible for the provider's [Health Personnel] operations." (Order at 5.) On October 9, 1996, Health Personnel filed a petition for certiorari with the Minnesota court of appeals. In an unpublished opinion, the court affirmed the penalty assessments and nonrenewal of Health Personnel's license. (Casey Aff. Attachment 9, Order March 18, 1997.)

On April 8, 1997, the parties in this matter participated in a prehearing conference. The Administrative Law Judge subsequently issued a prehearing order directing the parties to proceed under Minn. Rules, pt. 1400.5500(K) for summary disposition.

Background

In 1987, the Minnesota Legislature enacted the home care licensure law, Minn. Stat. §§ 144A.43 to 144A.49, which directed the Commissioner of Health to adopt rules to regulate, evaluate, monitor and license home health care providers. The home care rules, which govern the regulation and licensure of home care providers, were adopted and made effective in 1993. Minn. Rules ch. 4668. The home care statute describes home care services, which generally include any health care or personal care service

delivered in a place of residence to a person whose illness, disability or physical condition creates a need for the service. Minn. Stat. § 144A.43, subd. 3. The home care rules identify five classes of home care providers, A through E, who provide services ranging from sophisticated professional services such as nursing, physical therapy, and respiratory therapy (Class A) to programs which provide assisted living services to residents of residential centers (Class E).

In 1979, Mr. Buchanan founded Health Personnel. Health Personnel was licensed as a Class A home care provider pursuant to Minn. Rules, pt. 4668.0012, subp. 3A(1), and located in Duluth, Minnesota. (ALJ Report FOF 3). In 1989, Mr. Buchanan assumed exclusive ownership of Health Personnel. From 1981 to 1992, Health Personnel was certified to participate in the Medicare program. However, Health Personnel was dropped from the program in 1992 because of violations of federal conditions for participation. (ALJ Report FOF 3). In 1991, the Minnesota Department of Revenue imposed a lien on Health Personnel's revenues as a result of Mr. Buchanan's tax liabilities. In February of 1992, Mr. Buchanan purported to sell Health Personnel to his daughter Amy. (ALJ Report, FOF 20). Ms. Buchanan has not received her high school diploma and at the time of the sale was approximately 24 years old. (ALJ Report FOF 36; Tr. at 1296-1300). At the hearing, Amy Buchanan testified that she purchased Health Personnel from her father for \$450,000; in fact, the contract amount is \$150,000. (Tr. at 1334-39). Neither Gerald Buchanan nor Amy Buchanan knew how much of the agreement had been paid. (ALJ Report at p. 36).

In 1993, Health Personnel was granted a one-year provisional license from the Department, pursuant to Minn. Stat. § 144A.49. (ALJ Report, FOF 4). In October of 1993, the Department conducted unannounced surveys of Health Personnel. (ALJ Report FOF 5). Gerald Buchanan was at Health Personnel for the duration of the survey and was the sole representative of the licensee to participate in the exit conference. (ALJ Report FOF 7). Mr. Buchanan asked for clarification of several of the violations noted and assured the surveyors that the violations would be corrected. (*Id.*) The Department sent state licensing orders identifying 26 violations to Mr. Buchanan. (ALJ Report FOF 8). On January 4, 1994, Mr. Buchanan submitted a license renewal application for Health Personnel for a full Class A license. Mr. Buchanan identified himself on the application as Health Personnel's "manager" and "agent", and Amy Buchanan as "licensee" and "owner". (ALJ Report FOF 10). Because the application was incomplete, Mr. Buchanan completed and submitted a second application on January 28, 1994. On this application, Mr. Buchanan identified himself as "Man/admin" and "agent". (ALJ Report FOF 11). The first and second applications provided conflicting information regarding Health Personnel's revenues.

On January 4 and 5, 1994, the Department conducted a follow-up survey. (ALJ Report FOF 12). Mr. Buchanan again met with the surveyors at the exit conference and was informed that 11 of the previous violations had not been corrected and, thus, were subject to penalties. (*Id.*) In addition, the Department issued corrections orders for 13 other violations. (ALJ Report FOF 17). These notices were issued to Mr. Buchanan and he filed a timely appeal of the penalty assessments. (ALJ Report FOF 14 and 16). On June 27, 1994, the Department requested documents from Health Personnel to verify its revenues for 1992 and 1993. (ALJ Report FOF 20). Health Personnel did not

provide the financial information requested. (ALJ Report FOF 21). On August 31, 1994, Health Personnel's home care license expired. (ALJ Report FOF 22). The Department issued a six month conditional license to Health Personnel, pursuant to Minn. Rules, pt. 4668.0012, subp. 14. The conditional license was effective September 1, 1994 through February 28, 1995. The Department further advised the licensee by letter that a permanent license was contingent upon the Department's receipt, by November 1, 1994, of documentation confirming Health Personnel's 1992 and 1993 revenues and verifying who was ultimately accountable for Health Personnel. (ALJ Report FOF 23). The Department never received the information requested. (ALJ Report FOF 24).

On November 14 and 16, 1994, the Department conducted a third survey of Health Personnel. This time, Amy Buchanan participated in the exit conference. (ALJ Report FOF 25). When asked by the surveyors who was Health Personnel's administrator, Amy Buchanan identified her father, Gerald Buchanan. (ALJ Report FOF 26). On November 30, 1994, the Department notified Health Personnel that its license would not be renewed beyond its February 28, 1995 expiration date based on its failure to satisfy the conditions of its conditional license and on the 52 violations and penalty assessments of \$8,900. (ALJ Report FOF 32). Specifically, the Department cited as reasons for nonrenewal: (1) failure to submit verification of revenues for 1992 and 1993; (2) failure to submit a certified financial statement for 1992 and 1993; and (3) failure to confirm that Amy Buchanan was properly the person with ultimate accountability for Health Personnel. (Id.)

Health Personnel properly appealed the Department's decision. In the interim, Mr. Buchanan submitted an application on February 20, 1995 for a class A home health care agency license in the name of Covenant Home Care. (Casey Aff., Attachment 5). Mr. Buchanan identified himself as the person legally responsible for the operation of Covenant Home Care. (Id.) In a letter dated April 17, 1995, the Department denied Mr. Buchanan's application pursuant to Minn. Rules, pt. 4668.0012, subp. 11.E based on its conclusion that Mr. Buchanan was a managerial official of Health Personnel who, in that capacity, was substantially responsible for Health Personnel's failure to comply with the home care statute and rules. (Casey Aff., Attachment 6).

The contested case hearing in the matter of Health Personnel began on February 27, 1995 and concluded on March 27, 1995. The hearing was conducted by Administrative Law Judge Susan M. Williams and involved eight days of testimony. Both the Department and Health Personnel were represented by counsel. The record closed on June 8, 1995. On July 28, 1995, Judge Williams issued Findings of Fact, Conclusions and Recommendation. On June 27, 1996, the Commissioner of Health heard oral arguments from both parties. The Commissioner issued her final order on September 3, 1996. The order adopted the ALJ's Report and affirmed that the violations merited \$8,800.00 in penalties and that the failure to comply with the three conditions of its conditional license justified nonrenewal of Health Personnel's license. Moreover, the Commissioner noted that Health Personnel's failure to confirm who was ultimately accountable for the licensee, as required by the terms of its conditional license, merited "special comment". (Order at 4.) Based on the evidence at the

hearing, the Commissioner made a specific finding that “Gerald Buchanan is the actual individual responsible for the provider’s operations.” (Order at 5.)

During the pendency of the Health Personnel matter, Mr. Buchanan filed for bankruptcy under Chapter 7. On August 26, 1996, the bankruptcy trustee filed an objection inter alia to certain property Mr. Buchanan sought to exempt under Minn. Stat. § 550.37, subd. 6 as tools of the trade. (Casey Aff. Attachment 8). The trustee objected to the exemptions because Mr. Buchanan had not disclosed a business in which the property was used. (Id.) On October 1, 1996, Mr. Buchanan filed a response to the trustee’s objections and declared under penalty of perjury that he “operates Health Personnel, which is a home care business.” In addition, Mr. Buchanan stated that he testified at his §341 meeting with the bankruptcy trustee that he uses his computer, printer and fax particularly for Health Personnel. (Id.)

Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Minn. Rule pt. 1400.5500K; Minn.R.Civ.P. 56.03. The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters. See, Minn. Rules, pt. 1400.6600. A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case. Illinois Farmers Insurance Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978); Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808 (Minn. App. 1984).

The moving party, in this case the Department, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party’s burden under Minn. R. Civ. P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 75 (Minn. App. 1988). The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial. Carlisle, 437 N.W.2d at 715 (citing, Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)).

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Ostendorf v. Kenyon, 347 N.W.2d 834 (Minn. App. 1984). All doubts and factual inferences must be resolved against the moving party. See, e.g., Celotex, 477 U.S. at 325; Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971); Thompson v. Campbell, 845 F. Supp. 665, 672 (D. Minn. 1994). If reasonable minds could differ as

to the import of the evidence, judgment as a matter of law should not be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986).

The Department argues that summary disposition is appropriate in this case because the material facts are not in dispute. The Department maintains it properly denied Mr. Buchanan's application for a home health care license, pursuant to Minn. Rules, pt. 4668.0012, subp. 11.E, based on its conclusion that Mr. Buchanan was a managerial official of a previous home care agency (Health Personnel) who was substantially responsible for that licensee's noncompliance with the home care statute and rules. The Department contends that Mr. Buchanan has the burden of proving that he was not a managerial official at Health Personnel and that he was not substantially responsible for Health Personnel's failure to comply with the home care statute and rules. See, In re City of White Bear Lake, 247 N.W.2d 901, 904 (1976) (burden of proof to show that a license should be granted is on applicant). However, because the Commissioner has already ruled on this issue in a previous order, Mr. Buchanan cannot meet this burden. Therefore, there being no issues of material fact, the Department argues that it is entitled to summary disposition.

Mr. Buchanan opposes the Department's motion for summary disposition and maintains that the scope of his responsibility for Health Personnel is a disputed issue of material fact. Mr. Buchanan argues that the Commissioner's finding in her September 3, 1996 order that he was the individual responsible for Health Personnel's operations should not control in this case. According to Mr. Buchanan, he was never notified that his alleged responsibility for Health Personnel would be an issue in the prior contested case matter. Moreover, Mr. Buchanan contends that the issue of his responsibility for Health Personnel was not sufficiently litigated in the prior hearing. In support of his position, Mr. Buchanan points to the lack of a specific finding in the ALJ's Report regarding his authority or control over Health Personnel. Mr. Buchanan claims that had he understood that the responsibility issue was before the Commissioner at the prior hearing, he would have presented "witnesses, testimony, and documents, evidencing" his position with Health Personnel. (Buchanan Aff. at 16). In support of his opposition to this motion, Mr. Buchanan has submitted affidavits from himself and his daughter Amy Buchanan. Both affidavits contain general denials that Mr. Buchanan had the authority to establish or control business policy at Health Personnel.

The Department argues that the Commissioner of Health's specific finding that Mr. Buchanan was the actual person responsible for Health Personnel's operations collaterally estopps Mr. Buchanan from relitigating the issue of his responsibility for Health Personnel's noncompliance. The Department contends that the scope of Mr. Buchanan's responsibility was litigated and determined in the prior hearing and is the identical issue in this matter. Because Mr. Buchanan was a party to the first proceeding and was given a full and fair hearing, the Department maintains that Mr. Buchanan is collaterally estopped from relitigating the issue here.

Collateral Estoppel Standard

Collateral estoppel precludes parties from relitigating identical issues raised in a prior adjudication. Collateral estoppel is a flexible doctrine and the focus is on whether its application would work an injustice on the party against whom estoppel is urged.

Johnson v. Consolidated Freightways, Inc., 420 N.W.2d 608, 613-14 (Minn. 1988). In order for a court to apply collateral estoppel to an agency decision, five factors must be met: (1) the issue to be precluded must be identical to the issue raised in the prior agency adjudication; (2) the issue must have been necessary to the agency adjudication and properly before the agency; (3) the agency determination must be a final adjudication subject to judicial review; (4) the estopped party must be a party or in privity with a party to the prior agency determination; (5) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue. Falgren v. State, Bd. of Teaching, 545 N.W.2d 901, 905; *citing*, Graham v. Special School Dist. No. 1, 472 N.W.2d 114, 116 (Minn. 1991).

The matter before this Judge is the denial of Mr. Gerald Buchanan's application for a home health care agency license in the name of Covenant Home Care. The Department denied Mr. Buchanan's application based on its determination that Mr. Buchanan was substantially responsible for Health Personnel's failure to comply with the home care statutes and rules. In order to satisfy the first element of the collateral estoppel requirements, the issue of Mr. Buchanan's ownership of or responsibility for Health Personnel must have been litigated and necessary to the prior adjudication. The Administrative Law Judge finds Mr. Buchanan's claim that he was not notified that the question of his responsibility for Health Personnel was to be an issue in the prior hearing to be unpersuasive. The evidence established that on September 1, 1994, the Department issued a conditional license to Health Personnel and required that the agency provide to the Department, on or before November 1, 1994, documentation regarding its revenues and verification that Amy Buchanan was ultimately accountable for Health Personnel.

On November 30, 1994, the Department notified Health Personnel of its decision not to renew its conditional license. In this notice, the Department specifically stated that one of the reasons for nonrenewal of the license was Health Personnel's failure to satisfy the requirement that it confirm that Amy Buchanan was properly the person with ultimate accountability for the licensee. ALJ Williams stated in her Report that "[t]he third condition of the conditional license was that the Agency provide verification that Amy Buchanan was ultimately accountable as the licensee. The Agency did not provide any documents or verification to the Department on this issue." (ALJ Report at p. 37). The Judge concludes that Mr. Buchanan had notice that the question of who was ultimately accountable for Health Personnel was a determining factor in the Department's decision not to renew Health Personnel's license. Consequently, when Mr. Buchanan appealed the Department's decision not to renew Health Personnel's conditional license, he necessarily knew that the issue ownership or responsibility for Health Personnel would be considered at the hearing.

The Judge likewise rejects Mr. Buchanan's contention that the ownership or responsibility issue was not litigated at the prior hearing. Transcripts submitted by the Department demonstrate that this issue was in fact thoroughly litigated. In particular, the record reflects that under cross-examination, Mr. Buchanan adamantly maintained that after January 1, 1994 he ceased to function as Health Personnel's administrator. (Tr. pp. 1064-87). According to Mr. Buchanan, as of 1994 he operated only as Health Personnel's "agent", although sometimes he used the title "manager". (Tr. p. 1086).

Mr. Buchanan described his role as “exclusively ... to receive notices” and to informally advise Amy. (Tr. p. 1066) Likewise, Amy Buchanan testified as to her ownership of Health Personnel and her understanding of Gerald Buchanan’s role at Health Personnel after 1992. (Tr. pp. 1300-01; 1334-41).

While it is true that Judge Williams did not make a specific finding that Mr. Buchanan was ultimately accountable for Health Personnel, several other of her findings support such a conclusion. For example, the ALJ found that in both the October 1993 and January 1994 surveys, Mr. Buchanan was the only representative of Health Personnel who met the Department surveyors and participated in the exit conferences where the identified violations were discussed. (ALJ Report FOF 7 and 12). In addition, the ALJ made a specific finding that in November of 1994, Amy Buchanan identified Gerald Buchanan to the Department’s surveyors as Health Personnel’s Administrator. (ALJ Report FOF 26).

Moreover, after the issuance of the ALJ’s Report, the Commissioner heard oral arguments from both parties regarding exceptions to the ALJ’s findings and recommendation. On September 3, 1996 the Commissioner issued her final order which adopted the ALJ’s Report and affirmed the assessment of the penalties and the nonrenewal of Health Personnel’s license. Most significantly, the Commissioner made the specific finding in her order that “Gerald Buchanan is the actual individual responsible for the provider’s [Health Personnel] operations.”

Finally, the Judge also finds that the verified response Mr. Buchanan filed in U.S. Bankruptcy Court on October 1, 1996 supports the conclusion that Mr. Buchanan was substantially responsible for Health Personnel’s operations. In his filed response, which Mr. Buchanan declared to be true under penalty of perjury, Mr. Buchanan identified himself as the “operator” of Health Personnel. (Casey Aff. Attachment 8). Mr. Buchanan maintains that he meant only to indicate that he “operates” equipment at Health Personnel. The Judge does not find Mr. Buchanan’s explanation to be credible. (Buchanan Aff. at 11).

Despite his assertion that he would have presented “witnesses, testimony and documents evidencing” the scope of his authority at Health Personnel had he known it was an issue in the first hearing (Buchanan Aff. at 16), Mr. Buchanan has put forward no such evidence on the identical issue in response to the Department’s motion for summary disposition. Rather, Mr. Buchanan has submitted only two affidavits of himself and his daughter Amy. Both affidavits contain general averments and mere denials without any specific admissible facts. As such, the affidavits are insufficient to oppose the Department’s motion for summary disposition. See, Minn. R. Civ. P. 56.05; Erickson v. General United Life Ins. Co., 256 N.W.2d 255, 259 (Minn. 1977). Therefore, based on the ALJ’s Report, the partial transcripts submitted by the Department and the specific finding of the Commissioner, the Judge concludes that the issue of Mr. Buchanan’s responsibility for Health Personnel was litigated and adjudicated in the prior hearing and is identical to the issue in this matter.

With respect to the other collateral estoppel elements, the Judge finds that the Health Personnel hearing was a full evidentiary proceeding conducted pursuant to Minn. Rules, pts. 1400.5100-8500 and subject to judicial review. In fact, the Department’s

decision was reviewed and affirmed by the Court of Appeals in an unpublished opinion. (In the Matter of an Assessment and Denial of Renewal of License Issue to Health Personnel/Silver Lining Assisted Lifestyle, unpublished opinion, C4-96-2056 (March 18, 1997)). In addition, based on the Commissioner's finding regarding Mr. Buchanan's responsibility for Health Personnel's operations, the Judge concludes that Mr. Buchanan was the actual party to the proceeding. This determination is further supported by the fact that Mr. Buchanan provided the bulk of the testimony on behalf of Health Personnel.

Finally, the Judge finds that Mr. Buchanan had a full and fair opportunity to be heard. The Health Personnel hearing was presided over by an impartial hearing examiner and the parties were represented by counsel. The hearing involved testimony from seven witnesses taken over eight days. A record was made, which includes almost 1400 pages of transcript. Rules of evidence were followed pursuant to Minn. Rules, pt. 1400.7300, and Judge William's findings were found to be supported by substantial and competent evidence.

The Administrative Law Judge concludes that the issue of Gerald Buchanan's responsibility for Health Personnel's failure to comply with the home care statute and rules was litigated and determined in the prior Health Personnel hearing. Mr. Buchanan was a party to the Health Personnel hearing and was given a full and fair opportunity to be heard. Accordingly, Mr. Buchanan is collaterally estopped from relitigating the identical issue in this matter.

There being no issues of material fact, summary disposition for the Department is appropriate.

A.E.G.